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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 391

GEORGE B. PARR, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a–19a) is reported at 265 F. 2d 894.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1959 (Pet. 20a) and a petition for rehearing was denied on August 12, 1959 (Pet. 23a). The petition for a writ of certiorari was filed on September 10, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in refusing at the trial to give defense counsel access to the entire

transcript of the grand jury testimony of a prosecution witness, where the transcript was sought as of right and without attempting to show any particularized need therefor.

2. Whether the diversion from a school district of funds received through the mails violated the mail fraud statute, where the evidence showed that such use of the mails was an integral part of a continuing scheme to defraud.

STATUTE INVOLVED

18 U.S.C. 1341 provides as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT

A twenty-count indictment filed in the District Court for the Southern District of Texas charged petitioners in counts 1 to 19 with mail fraud (18 U.S.C. 1341) and in count 20 with conspiracy to commit mail fraud (18 U.S.C. 371) (I, 10–30).[1] The first count gave a general description of the scheme, set out three continuing fraudulent representations made by petitioners, alleged in general terms the ways in which petitioners acted to carry out the fraud, and alleged a specific use of the mails to further the fraud (I, 10–17). Each of counts 2 to 19 alleged a different specific use of the mails. The conspiracy count realleged the various specific uses of the mails as overt acts, as well as additional overt acts.

On July 17, 1957, following jury trial, all of the petitioners were found guilty of one or more counts and received sentences as shown in the following table (XVI, 5652–5667):[2]

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[1] The record of trial, in sixteen volumes (the index in a separately-bound seventeenth volume), is consecutively paginated. To facilitate use of the references, both the volume and page number are given.

[2] At the first trial on this indictment, in November and December 1956, petitioners Oliveira and O. P. Carrillo had been found not guilty as to counts one through nineteen. Garcia was found not guilty as to counts one through three, six, seven, nine through twelve, and sixteen. The San Diego State Bank was found not guilty on counts four through six, eight, nine, thirteen through fifteen, and seventeen through nineteen. A mistrial ensued as to the other counts (II, 455–457).

Petitioner	Counts, findings of guilty	Sentence
Farr	1-20	5 years on each count, 1-10 concurrent, 11-20 concurrent but consecutive to 1-10, $1,000 cumulative fines on counts 1-20.
Chapa	1-20	5 years on each count, all concurrent.
Donald	1-14, 17-20	4 years on each count, all concurrent.
Garza	all except 7	3 years on each count, all concurrent, suspended during 5-year probation period.
Garcia	4, 5, 8, 13-15, 17-20	3 years on each count, all concurrent, suspended during 5-year probation period.
Saenz	all except 7	3 years on each count, all concurrent.
Oscar Carrillo, Sr.	1-20	4 years on each count, all concurrent.
Oliveira	20	2 years and a $7,000 fine, imprisonment suspended during 5-year probation period.
O. P. Carrillo	20	2 years, suspended during 5-year probation period.
Texas State Bank	1-20	$100 cumulative fines on each count, a total of $2,000.
San Diego State Bank	1-3, 7, 10-12, 16, 20	$100 cumulative fines on each count, a total of $600.

The evidence, the sufficiency of which is not challenged, established the following facts:

1. THE BACKGROUND

The Benavides Independent School District ("B.I.S.D.") is located in Duval County, Texas (III, 719). It is governed by a seven-man Board of Trustees (III, 727), which operates two schools within the District: one at Freer, Texas, the other at Benavides, Texas (III, 724). During the life of the scheme (September 1949 to February 1954), it was the practice to operate the schools separately, to the extent that three trustees living in Freer were completely responsible for the Freer school, and four trustees living in Benavides were totally responsible for the Benavides school (III, 725–726). The monies spent on education were apportioned equally between the two schools (III, 731). However, the Benavides members entered into contracts for the Board, hired the Board's attorney, handled the Board's relationship with the tax

assessor-collector, filed the annual reports of school funds required by the State of Texas before state funds could be paid, and did the District's banking (III, 682, 726–728, 734).

Six of the individual petitioners were officially connected with the School District. David Carrillo Chapa was Tax Collector-Assessor (III, 840, 864; VII, 2322; X, 3347). His son, Oscar Carrillo, Sr., was Secretary of the School Board (*ibid.*). Another son, O. P. Carrillo, was attorney for the School Board from February 1953 to February 1954 (VI, 1999–2000; VII, 2001). Octavio Saenz, Jesus Garza, and Santiago Garcia were three of the four Benavides members of the Board of Trustees, with Saenz the president (III, 834; V, 1210).[3] B. F. Donald was the cashier of the Texas State Bank, which was the official depository of B.I.S.D. funds; Oliveira was a director of that bank; and Parr was the president of, and active member in, both petitioner banks (III, 900; IV, 901–902, 924, 998–1001, 1008–1009, 1016; VI, 1728, 1929–1930; Govt. Exs. 22, 23, 45, 46).

Although petitioner Parr did not hold any official position (III, 859, 862), he was the dominant figure in the school district.[4] The books and records of the District were kept at his office building in San Diego, Texas, until July, 1951, when he gave permission to move them back to Benavides (VII, 2361; X, 3302, 3324–3326). He had as easy access to the records as a member of the School Board (X, 3302), attended

[3] The fourth Benavides Board member, Richard Barton, took little part in the Board's activities (IV, 969–970).

[4] As Benson, the auditor for the School District put it, "There wasn't but one man to talk to. That was Mr. Parr" (X, 3429).

all important meetings of the Board (VII, 2388; X, 3304–3305, 3471), countersigned all B.I.S.D. checks after June, 1950 (VII, 2364; X, 3310–3311), and personally approved all salary advances to employees of more than $100 (X, 3314, 3427, 3472).

About 75–85% of the taxable property value of the B.I.S.D. consists of mineral rights primarily owned by non-residents (X, 3323). The total tax assessment, as shown by the District's tax rolls, increased from about $400,000 in 1949 to $650,000 for the year 1952 (X, 3377–3378). The State of Texas contributed an average of over $140,000 per year to the School District during the life of the scheme (Govt. Exs. 1–5). In 1953 and 1954, the Freer school budget was a little more than $200,000 (V, 1209);[5] each school received an equal share of the funds actually spent for school operation. Thus, after deducting the $400,000 required to operate both schools, there was as much as $390,000 available in the years following 1952 to meet the operating expenses of the School District's office. Although no more than six persons were employed to handle business records (VII, 2321, 2324), the School District was "two and a half years in debt" when petitioners left the Board of Trustees in February 1954 (X, 3435).

In collecting the taxes within the District it was the practice to type up the real estate tax rolls according to various classifications, mail out statements to the taxpayers, receive the payments, and mail out

[5] The Freer budget increased from $200,000 to $278,000 the year after petitioners left the Board of Trustees (V, 1209–1210).

tax receipts (V, 1579–1584). In 1951–1953 the handling of the mail was under the direct supervision of petitioners Chapa and Oscar Carrillo, and their personal secretaries (V, 1584; VII, 2367–2370).

To obtain the state funds it was necessary for the B.I.S.D. to file annual reports at Austin, Texas, with the Texas Education Agency (III, 697, 709). These reports, listing each check paid by the School District (and showing the number of the check, the date it was made, the name of the payee, and the date the check was cashed), were prepared at the Texas State Bank building and were signed by petitioner Saenz as President of the Board of Trustees and by Jewel Mayfield (a co-conspirator but not a defendant), or by petitioner Donald for the Texas State Bank (IV, 1165–1168; Govt. Exs. 1–5).

2. THE SCHEME TO DEFRAUD

The scheme to defraud involved sizable misappropriations of School District funds. Petitioners used three main devices to drain off the funds. (1) A large number of the checks shown on the annual reports filed with the Texas Education Agency as having been drawn against B.I.S.D. funds were payable to fictitious persons. (2) Another large group of checks, payable to living persons, were in payment for services which actually were never rendered or for materials which were never delivered. Eliminating duplications, these checks total almost $190,000. (X, 3349–3350; Govt. Exs. 9, 10). (3) Petitioners intercepted checks received by mail in payment of

property taxes before the checks were deposited in the depository bank. The checks were then cashed and the proceeds appropriated by the petitioners. (4) In addition, petitioners charged the School District for various items which they used personally.

a. *Checks payable to fictitious persons.*—From the inception of the scheme in late 1948 or early 1949, until its collapse in February 1954, large bundles of B.I.S.D. checks drawn to the order of fictitious payees were regularly cashed at the Texas State Bank. The total face amount of each bundle of checks ranged from eight to twelve thousand dollars; a group of such checks would usually be cashed once or twice each month. The bank tellers recalled that the checks would usually be taken to petitioner Donald, who would cash them at one of the tellers' cages and seal the currency in an envelope. If Donald was absent from the bank, the checks would be cashed directly by one of the tellers. (III, 738–740, 745, 755, 768, 796, 804, 814–815, 822, 827; IV, 1005, 1010–1016, 1023, 1032–1033, 1091–1093, 1095–1098, 1154–1159; VI, 1979–1982; Govt. Ex. 9).

Special rules were adopted by Donald with respect to the bundles of B.I.S.D. checks brought to the bank. No endorsements were required on the checks and no teller's cash stamp was placed on them when they were cashed—a variance from normal banking practice. The bank's proof department was instructed that the teller's cash stamp was unnecessary on the School District checks (IV, 1003, 1011–1016, 1154, 1159). The checks drawn against District funds

and payable to fictitious persons total over $122,000 (X, 3349, Govt. Ex. 9).

Mr. W. M. Benson, who for many years was both petitioner Parr's accountant and the auditor for the School District, and Diego Heras, who was the "acting secretary" for the District until July 1951, testified as to the beginnings of the scheme.[28] Sometime in late 1948 or early 1949, Heras gave Benson a bundle of B.I.S.D. checks made out to various payees and asked him to cash the checks and give the money to petitioner Parr. Benson left the checks with petitioner Donald at the Texas State Bank and returned some fifteen minutes later to pick up a sealed envelope which he took back to Parr at Parr's office in San Diego. On another later occasion Benson was given a similar envelope by Heras and told to give it to Parr. Believing that the envelopes contained money, Benson asked Parr "about it and he said it wasn't his income, that he had some money for political expenses." (VII, 2321, 2325; X, 3308–3309).

As Heras remembered the situation, the practice of cashing bundles of School District checks began in 1948. Initially, petitioner Parr came to Heras, gave him a list of names next to which certain amounts were set out, and instructed him to prepare checks for those persons. The names were completely unknown to Heras, although he had lived in Duval County,

[28] Since the statute of limitations had run as to all substantive offenses committed prior to September 1, 1951, the testimony of both Benson and Heras was admitted only to show the origin of the scheme and the fact that the continuing conspiracy began before the September date. The trial judge gave the jury appropriate instructions to that effect (XV, 5505).

Texas, all his life and had worked for the School District since 1930 or 1931. Heras prepared the checks drawn on a School District account, signed them, secured the necessary countersignature of Benson,[6] and took the checks to Parr (VII, 2320–2321, 2325, 2329–2330, 2340, 2350).

As noted *supra*, p. 8, the practice was repeated at regular intervals. Sometimes Parr would keep the checks brought to him by Heras and Heras would not see them again until the School District's cancelled checks were returned by the bank at the end of the month. Other times Parr instructed Heras to take the checks to Donald, cash them, and bring the proceeds back to Parr. Heras corroborated Benson's testimony that, on at least one occasion in 1948 or 1949, Benson made the trip to the bank in place of Heras and returned with money for Parr. On one or two occasions Parr instructed Heras to give the proceeds to petitioner Chapa (VII, 2331–2351, 2393).

Heras was relieved of his secretarial duties in July 1951, when the School District books, at Parr's direction, were moved from San Diego to Benavides. Heras neither signed nor typed any B.I.S.D. checks after that date (VII, 2321, 2360–2361, 2367–2368). All School District checks made after that date were signed either by Oscar Carrillo, Sr. or by petitioner Saenz, with Parr continuing to countersign. There was evidence which indicated that Oscar Carrillo, Sr. was the person who actually took the checks to the

[6] Parr began personally countersigning School District checks in June 1950 (X, 3309–3310).

bank after July 1951 (IV, 1154–1159; VI, 1932–1934; Govt. Ex. 110).

b. *Checks drawn for services never rendered or materials never delivered.*—Other checks were drawn against School District funds for services never performed or materials never delivered (III, 740–742; Govt. Ex. 10). Often, these checks were made payable to names which were paraphrases of the names of teachers actually employed. Other checks were made payable to living persons, but were not received or cashed by the payees (III, 841–858; IV, 1191; V, 1209, 1231, 1235, 1237, 1239–1241, 1257–1258, 1262, 1264–1269, 1272, 1283–1285, 1291, 1294, 1299, 1305). One check for $584.45 for services was made payable to an eleven-year-old school boy (V, 1262–1263). Checks for service never rendered or materials never delivered, apart from the checks described earlier as payable to fictitious persons, totaled more than $67,000 (X, 3350; Govt. Ex. 10).

Saenz, Garcia, Garza, Oliveira and Chapa were on the regular payroll of the B.I.S.D., either under one or more fictitious names or under their own name for fictitious services.

Petitioner Saenz, from 1949 through 1952, regularly deposited in his personal bank account certain School District checks drawn to eight different payees, seven named Saenz (with varying initials) and one named Sanchez. Most of the checks were for one hundred and twenty-five dollars. All were endorsed by petitioner Saenz (V, 1542–1543, 1547, 1550, 1567, 1570; VIII, 2406–2409; Govt. Ex. 110).

Petitioners Garza and Garcia received regular monthly checks drawn on School District funds and made payable to their respective daughters, both of whom were in school away from Benavides (III, 719, 740–742; VIII, 2402–2405; X, 3540–3543, 3553–3554, 3570–3574).

From 1950 until the middle of 1952, petitioner Oliveira received a monthly $100.00 salary from the School District for services which he never performed (IV, 957; VII, 2002–2003, 2073–2074; Govt. Exs. 1, 2, 4, 10). In mid-1952, the salary ceased but Oliveira's implement company began receiving regular monthly checks ranging in amount from $99.31 to $102.00 for alleged janitorial supplies which were never delivered (VII, 2004–2008; Govt. Ex. 222).

Petitioner Chapa regularly received three School District checks each month (VII, 2395–2400). Parr's brother-in-law, Mr. B. G. Moffett, received $500 per month from the B.I.S.D. for several years, although he did not perform any services for the District (V, 1418–1422).

c. *Checks received from taxpayers which were diverted before deposit in School District accounts.*— On many occasions checks received through the mails in payment of taxes were cashed for petitioner Chapa at the local Benavides bank or at the petitioner San Diego State Bank. At the Benavides bank, this was usually done weekly, or every other week, and the money returned to Chapa (V, 1581–1590). Among those so cashed were the following: A Texas Eastern Production Company check for $6,525.35 cashed on

October 23, 1953; a Pan American Production Company check dated September 25, 1952 for $2,548.29; an Ibex Company check dated October 30, 1953 for $5,261.10; a Calvert and Manley check dated October 11, 1953 for $3,298.25; a Ralph E. Fair, Inc. check dated September 26, 1952 for $6,179.58; and a Rodney De Lange check for $1,591.24, cashed on December 16, 1953 (X, 3586–3587; XI, 3624–3634). Some of these checks bore the endorsement of Oscar Carrillo, Sr. (XI, 3641–3644). No cash was ever deposited in the School District accounts in 1952 or 1953 (VI, 1888–1897; Govt. Exs. 85–87).

Petitioner Chapa maintained a bank account at the San Diego bank and also secured loans from that institution. On October 5, 1943, four taxpayers' checks totaling $5,243.22 were processed through the San Diego bank. That same day $499.82 was deposited in Chapa's personal account and his loan account was reduced by $4,643.43, a total credit to him of $5,143.22. On October 14, 1953, taxpayers' checks totaling $2,682.90 were put through the bank and Chapa's indebtedness was reduced by $2,980.00 that same day (VI, 1690–1693, 1756–1758).[7]

[7] There was evidence that properties had been left off the tax rolls in 1953, with special series tax notices and receipts sent to these taxpayers (VII, 2195–2207). The properties represented by all four taxpayers' checks cashed on October 5th do not appear on School District tax rolls for 1953. The same is true of two of the four checks cashed on October 14th (V, 1337–1338, 1347–1348, 1351–1352, 1357–1364, 1370–1372, 1386). Uncontradicted expert handwriting testimony was that the signature on the special series of tax receipts covering properties not listed on the tax roll was that of petitioner D. C. Chapa (XI, 3807–3819).

d. *Use of School Board funds for personal purposes.*—The School District had a Conoco credit card and an open account at the Conoco Service Station in Benavides. During 1951, 1952 and 1953, petitioners Oscar Carrillo, Sr. and Garza regularly obtained gasoline and other supplies for their personal use and had the purchases charged to the School District (V, 1454–1459, 1490–1504, 1516–1518, 1536–1542). The purchases were paid for by the District in due course (V, 1423–1430).

Petitioner O. P. Carrillo remodeled and equipped his law offices in September 1952, at the expense of the School District. The District paid $582.81 for building materials used in the course of the work (VI, 1798–1809) and $1,094.00 for Carrillo's office furniture (VI, 1877–1880), although the Board of Trustees had not authorized this expenditure (IV, 956).

3. THE USE OF THE MAILS

The source of much of the funds diverted was tax payments received from non-resident holders of mineral rights located within the district. There was abundant evidence that such receipts were obtained through use of the mails.

a. On or about July 21, 1952, the Humble Oil and Refining Company received, at Houston, Texas, a letter from the B.I.S.D. Board of Equalization (signed by Oscar Carrillo, Sr.) giving notice of a hearing to consider raising the value assessment of Humble property within the District. The Humble Company issued a check to the District, dated September 26, 1952, for $43,166.07 to pay its taxes for that year,

mailed it together with a letter of transmittal, and received a receipt by mail in return (Counts 1, 2, 3; XI, 3727, 3732, 3740, 3749).

Humble received another similar letter from the Board of Equalization on May 27, 1953. It sent a check for $53,807.35 and a letter of transmittal by mail on September 24, 1953, again receiving a receipt from the B.I.S.D. by mail (Counts 4, 5; XI, 3728, 3732, 3750).

Count 6 relates to the payment of property taxes by Humble on September 25, 1951, in the amount of $34,285.09, also by mail (XI, 3726–3727, 3749).

b. Counts 7, 8, 9, and 10 deal with property tax payments made by the C. W. Hahl Company, Houston, Texas, to the B.I.S.D. in 1951, 1952, and 1953, and a letter received by the Company from the District on December 3, 1952. All of these transactions were carried on by mail (XI, 3755–3761).

c. The Texas Company, with offices in Houston, Texas, also held substantial property within the District. On September 28, 1951, it paid property taxes amounting to $13,532.64 (Count 11; XI, 3706–3708); on September 26, 1952, its payment was $13,078.72 (Count 12; XI, 3708–3709); and on September 30, 1953, it paid $14,665.04 (Count 13; XI, 3709–3710). The Texas Pipe Line Company paid property taxes of $330.84 on September 30, 1953 (Count 14; XI, 3710–3711). All of these payments were made through the mails.

d. Mr. J. E. Beall's payment of property taxes by mail was the subject of counts 15 and 16. One of

these checks was rubber-stamped by the Tax Collector-Assessor, endorsed by one of Chapa's office employees, and cashed at the local Benavides bank (V, 1336–1341). The other was used to reduce petitioner Chapa's note liability at the San Diego bank on October 14, 1953 (VI, 1693).

e. In addition to the foregoing use of the mails in obtaining tax payments, the mails were also used in paying the Continental Oil Company for the products which two of the petitioners had obtained for their personal use but charged to the District (see *supra*, p. 14). In March 1953, Continental billed (Count 19; V, 1424–1425) and was paid for such purchases (Count 18; V, 1429). In June 1953, it again billed the District (Count 17; V, 1426).

ARGUMENT

1. Petitioners' principal contention (Pet. 8–18) is that the trial court erred in denying their request for the transcript of the grand jury testimony of the government's witness Heras. The facts with respect to the denial of that request are as follows:

Heras was one of 73 government witnesses. At the beginning of his direct testimony, defense counsel asked for access to any statements made by the witness touching the subject matter of his testimony so as to follow the testimony, although counsel admittedly had "had him on the witness stand four times. I know what his testimony will be * * *." (VII, 2284–2285). A ruling on this request was deferred until the end of the direct examination (VII, 2296, 2318). During a lengthy discussion to determine

what statements were in existence (VII, 2284–2320), defense counsel did not request the grand jury minutes of Heras' testimony, expressly stating "I am not asking about Federal grand jury testimony" (VII, 2313). After Heras had completed his direct testimony, the government delivered ten statements to defense counsel (VIII, 2429–2437).[8]

Defense counsel then made a "request * * * for the testimony of this witness before the Federal grand jury" (VIII, 2441). A brief colloquy ensued during which defense counsel made no attempt to show any need for the transcript and did not request the court to examine it.[9] The court denied the request (*ibid.*),

[8] They were:

1. An affidavit executed on March 18, 1953, by Heras to a Texas official.

2. An affidavit executed April 30, 1953, to a Texas official.

3. A sworn statement given to Special Agent Edgar W. Henley, on December 11, 1953.

4. A signed statement given on February 9, 1954, to Post Office Inspectors Main and Cauley, which included a signed statement given one day earlier to the two inspectors.

5. A memorandum of interviews conducted February 8 and 9, 1953, prepared by the inspectors.

6. An unsigned memorandum of an interview conducted by the inspectors on February 15, 1954.

7. An affidavit executed by Heras on April 9, 1954, and a handwritten affidavit signed by Heras on April 21, 1954, before a Special Agent named W. H. Niendorf.

8. An unsigned, undated statement purportedly made by Heras to an internal revenue agent in May, 1954.

9. A transcript of Heras' testimony before an improperly constituted Texas state grand jury entitled, "Diego Heras, Questions by Gresham."

10. A transcript similar to 9, above, entitled "Questioning, Sam H. Burris."

[9] Defense counsel stated only that "[w]e would like to establish the fact that he [the prosecutor] does have this testi-

stating: "It is my opinion that it is privileged, and secret, and I will rule, subject to all risks, that you cannot have it" (VIII, 2442).

Heras was subjected to a searching and protracted cross-examination. During its course, defense counsel was given, in addition to the material given to him at the close of the direct examination (see note 8, *supra*, p. 17), six other statements made by the witness out of court. Two were handwritten statements made on April 9 and 11, 1953 (VIII, 2470–2471, 2480, 2520–2521). The other four statements were made on February 10–11, 1954, and August 11, 1955 (VIII, 2480–2481).[10]

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mony and has it in the courtroom and had it prior to the time the trial started" (VIII, 2441).

[10] Later in the trial the government called William Benson as a witness. Defense counsel requested access to a transcript of Benson's testimony before grand juries, including the grand jury which returned this indictment. The district court denied the request for the Federal grand jury transcript (X, 3291–3293). During the course of Benson's direct examination, defense counsel was given the following statements of the witness (X, 3331):

1. Those pages of an unsigned statement given to special agents Niendorf and Henley on June 1, 1954, which related to the subject matter of Benson's testimony.

2. Memorandum of interviews between the agents and Benson dated June 22, 1954.

3. A transcript of questions asked by Gresham and answered by Benson on July 14, 1954.

4. A penciled memorandum of interviews between agents Niendorf and Gromatzky and Benson, dated December 1, 1954.

5. A statement given by Benson to agent Drew on June 18, 1955.

It subsequently developed that government counsel did not have a transcript of Benson's testimony before the grand jury which returned this indictment (X, 3335).

a. We submit that this Court's recent decision in *Pittsburgh Plate Glass Company* v. *United States*, 360 U.S. 395, is fully dispositive of petitioners' argument on this point. In holding that the trial court had not erred in refusing to make the grand jury transcript of a government witness available to the defense for use in cross-examination, the Court stated (p. 400) that the "burden * * * is on the defense to show that 'a particularized need' exists for the minutes which outweighs the policy of [grand jury] secrecy"; and it ruled (pp. 400–401) that:

> the petitioners failed to show any need whatever for the testimony of the witness Jonas. They contended only that they had a "right" to the transcript because it dealt with subject matter generally covered at the trial. * * * The short of it is that in the present case the petitioners did not invoke the discretion of the trial judge, but asserted a supposed absolute right, a right which we hold they did not have.

Similarly, in the instant case petitioners "failed to show any need whatever for the [grand jury] testimony of the witness." Heras, but sought it solely as of right. Although petitioners now advance various arguments as to why they needed the transcript (Pet. 9–10), they did not seek it on these bases at the trial. They did not request the trial judge to examine the transcript to determine if it related to the subject matter of Heras' testimony, did not suggest any special reasons for disclosure, and did not themselves see any need for the grand jury transcript when they first raised the question of out-of-court statements. Even after completing their lengthy cross-examination of Heras,

petitioners did not make any attempt to show a need for the transcript, or renew their request for its production.

In short, petitioners made no attempt to show a "particularized need" (*Pittsburgh Plate Glass, supra,* p. 400; see *United States* v. *Procter & Gamble,* 356 U.S. 677, 678) for breaching the traditional secrecy of grand jury proceedings.[11] The trial court was thus fully warranted in denying production.

b. Nor does this record support petitioners' present claim (Pet. 9–10) that they had a need for the transcript sufficient to justify breaching grand jury secrecy. Contrary to their statement (Pet. 9), Heras was not "the principal prosecution witness."

There was no single "principal" government witness: the government's case was established by 73 witnesses and 174 exhibits, many of which contained numerous specific items. In a trial lasting two and one half months, the government devoted only one day to the direct examination of Heras; the defense devoted all of five days and part of two more to his cross-examination. Heras' direct testimony dealt only with events prior to July, 1951, when he ceased performing secretarial functions for the School District, and it was admitted for the specific limited purpose of showing the origin of the scheme to defraud and not as proof of the substantive offenses. Moreover,

[11] This inability was not due to lack of sufficient reflection, since counsel discussed the Heras statements on three occasions with the trial court, and the colloquies cover 92 pages in the record (VII, 2284–2320; VIII, 2425–2481).

Heras' testimony dealt with only one of the three principal methods used by petitioners to siphon off District funds.

There was substantial independent evidence (in addition to Heras' testimony) that petitioners misappropriated large amounts of School Board funds through the device of cashing checks drawn to the order of fictitious payees. Evidence that the payees were fictitious included testimony of the eight postmasters in the area that they had never heard of the payees [12] and testimony of a postal inspector that he was unable to find any of the payees of the checks listed in Government Exhibit 9, which was a list of hundreds of checks paid by the school board during the years 1948 to 1954 (III, 738–740, 742–743, 753, 766, 794, 802, 813, 821, 826; VI, 1979–1982). The fact that B.I.S.D. checks were cashed in bundles at the Texas State Bank was shown by the testimony of the bank tellers. Benson, the auditor of the District and a man who handled Parr's books for many years, was the source of testimony that petitioner Parr was the recipient of the money on the two occasions that Benson handled the proceeds of the checks. The foregoing evidence also showed that these illegal practices continued long after Heras had ceased serving as Secretary of the School Board.

Over and above these items of specific corroboration, there is a wealth of documentary and oral evi-

[12] One postmaster (Hebbronville, Texas) did testify that one name was that of a real person, but no connection of this person with the B.I.S.D. was ever shown (III, 797).

dence showing that all the petitioners had participated in a massive fraud—evidence of such quality and quantity as to refute petitioners' contention that Heras' testimony was the pivot on which the government's case turned. The checks themselves, in number and amount, and bearing the proven signatures of Parr and Oscar Carrillo, Sr., or Saenz, clearly show the fraudulent character of the enterprise (see, for example, Govt. Ex. 110).

Finally, petitioners were given extensive material to use in conducting the searching cross-examination to which they subjected Heras. As we have shown *supra*, pp. 17, 18, they were furnished numerous out-of-court statements made by the witness, which ranged from memoranda recording the results of oral interviews to transcripts of testimony before state grand juries. With the aid of this material, they subjected Heras to an extremely detailed cross-examination during which no significant aspect of his direct examination was not thoroughly probed.

2. There is no merit to petitioners' contention (Pet. 16–17) that the holding here involves a potentially "vast extension of federal jurisdiction over criminal offenses of purely state or local concern," which would result in making "any state crime involving embezzlement * * * a federal offense." Although petitioners state (Pet. 17) that the "use of the mails in this case had nothing to do with any scheme of embezzlement," their use was in fact an integral part of, and essential to, the successful operation of the scheme to defraud. The mail fraud statute frequently has been applied

to similar local schemes in which the use of the mails was an essential element (see *infra*, pp. 24–25).[13]

The record shows that the use of the mails here "was an essential part of the scheme" (*Pereira* v. *United States*, 347 U.S. 1, 8) and a contemplated part of the conspiracy in several respects. The annual reports that the School District made to the State of Texas, which falsely represented the receipts and disbursements of the District (I, 13, 15–16), were all transmitted to the State by mail. Submission of such reports was necessary for the District to obtain funds from the State (*supra*, pp. 5, 7). Similarly, the implied representation in the tax assessments that school board funds "were disbursed to persons and concerns for services and materials furnished to the BISD" (I, 13) were made to taxpayers located outside the school district through the mails (*supra*, pp. 6, 14–16). Finally, much of the tax funds unlawfully diverted came by mail from non-resident oil companies (*supra*, pp. 6, 14–16). This latter fact was particularly significant in enabling petitioners to carry on and conceal their fraudulent scheme for so long. For those companies would be unlikely to check on the financial conditions of local school boards, the nature of local expenditures, or the causes behind increasing local taxes.

Convictions under the mail fraud statute have been sustained where the use of the mails to defraud a local

[13] It has also been applied to primary election commissioners who defraud in the course of discharging their duties. *United States* v. *Classic, et al.*, 35 F. Supp. 457 (E.D. La.).

governmental body was less closely "incident to an essential part of the scheme" (*Pereira, supra*) than in the instant case. *Weiss* v. *United States,* 120 F. 2d 472, rehearing denied, 122 F. 2d 675 (C.A. 5), certiorari denied, 314 U.S. 687; *Steiner* v. *United States,* 134 F. 2d 931 (C.A. 5), certiorari denied, 319 U.S. 774; *Shushan* v. *United States,* 117 F. 2d 110 (C.A. 5), certiorari denied, 313 U.S. 574; *Bradford* v. *United States,* 129 F. 2d 274, rehearing denied, 130 F. 2d 630 (C.A. 5), certiorari denied, 317 U.S. 683; *United States* v. *Leche,* 34 F. Supp. 982 (W.D. La.), affirmed, 118 F. 2d 246 (C.A. 5), certiorari denied, 314 U.S. 617; *Hart* v. *United States,* 112 F. 2d 128 (C.A. 5), certiorari denied, 311 U.S. 684. In *Weiss,* the scheme was to defraud the State by fraudulently increasing the price to be charged by contractors for the construction of a public building; the use of the mails was the sending by Weiss, an architect, of his architect's certificates. In *Leche,* the scheme involved the elimination of competitive bidding for highway equipment sold to the State, the paying of exorbitant prices for such equipment, and the granting of rebates on such purchases; the mails were used to send checks in payment of the purchases.

The foregoing authorities also refute petitioners' argument (Pet. 17) that they did not violate the mail fraud statute because the particular mailings on which the substantive counts were based involved "an entirely lawful transaction," namely "[t]he giving of information and the receipt by mail of a portion of the tax collections." The mail fraud statute may be violated even though the mailings themselves did

not involve any illegal transaction, and even though they would have been made had there been no scheme to defraud. For the crucial question is not whether the mails would have been used had there been no scheme, but whether their use was "incident to an essential part of the scheme" (*Pereira* v. *United States*, 347 U.S. 1, 8). Here the trial judge correctly charged the jury (XV, 5502) that, in order to convict, it had to find that "the mails were in use for the purpose of effecting the scheme"; and the evidence showed that the mails were so used. Indeed, as the court of appeals pointed out (Pet. 8a), "[b]y claiming that the mails are necessarily used in the lawful activities of B.I.S.D. [petitioners] show that they must have contemplated that their fraudulent scheme of building up sufficient funds for the fraudulent purposes would necessarily involve the use of the mails * * *."[14]

Contrary to petitioners' contention (Pet. 20–21), the decision below does not conflict with *Kann* v. *United States*, 323 U.S. 88. There the defendants obtained checks by fraud and cashed or deposited them in a local bank, and the mails were then used by the latter in collecting the checks. The Court held that, since the fraudulent scheme was consummated when the defendants cashed the checks at the local bank, the subsequent use of the mails by the

[14] See also *Stephens* v. *United States*, 41 F. 2d 440, 447 (C.A. 9), certiorari denied *sub nom. Spicer* v. *United States*, 282 U.S. 880, and *Morris* v. *United States*, 112 F. 2d 522, 525 (C.A. 5), certiorari denied, 311 U.S. 653, where legitimate business activities of private corporations, conducted by mail, were used to cloak a mail fraud.

bank in collecting the checks was not "for the purpose of executing the scheme" (p. 94).

In the instant case, however, the "scheme was a continuous one," and "[u]nless money came in, the scheme would not and could not operate * * *. The collection of * * * [taxes] was an integral part of the continuous and operating scheme to defraud, and the mails were used to accomplish their collection." *Steiner* v. *United States, supra,* pp. 933–934. As the court below stated (Pet. 8a):

> The evidence which could be accepted by the jury as true showed a continuing scheme to maintain control over the finances of B.I.S.D. to make possible the continued collection of state funds and taxes and the illegal use of part of these funds for the benefit of the conspirators. There was ample basis for the jury to find that the use of the mails was in furtherance of the scheme and not after it had been fully effectuated.

The evidence showed that the tax funds were never out of the control of petitioners, even when they had been deposited in the bank (which Parr controlled) (see *supra,* pp. 5, 8–12). This control made it possible for the scheme to be continued for five years; and as long as the scheme continued its success depended upon the use of the mails.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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